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19 UNITED STATES DISTRICT COURT

20 EASTERN DISTRICT OF CALIFORNIA

21 FULL CIRCLE OF LIVING AND
22 DYING, et al.,

23 Plaintiffs,
v.

24 GINA SANCHEZ in her official capacity as
25 Bureau Chief of the Cemetery and Funeral
Bureau, et al.,

26 Defendants.

27 No. 2:20-cv-01306-KJM-KJN

28 **PLAINTIFFS' REPLY IN SUPPORT
OF PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT**

Date: February 11, 2022
Time: 10:00 a.m.
Courtroom: 3, 15th Floor
Judge: Hon. Kimberley J. Mueller

INTRODUCTION

2 The Bureau’s¹ response fails to counter Plaintiffs’ case for summary judgment. First,
3 Plaintiffs explain below that there are no material factual disputes that should preclude summary
4 judgment. Next, Plaintiffs demonstrate in Part I that the Bureau’s standing objection to the First
5 Amendment claim about advice has no more merit now than it did when this Court rejected it at
6 the preliminary-injunction stage. In Part II, Plaintiffs show that the Bureau’s public-health
7 argument against the substantive due-process claim is essentially the same public-health argument
8 that the government made—and the Fifth Circuit explicitly rejected—in *St. Joseph Abbey*. Last,
9 because the Bureau cannot apply the funeral statutes to restrict Plaintiffs’ speech or conduct, there
10 is no basis to regulate their truthful advertising about what they may lawfully say and do (Part III).

THERE ARE NO TRULY DISPUTED MATERIAL FACTS

12 The Bureau’s fact response has “undisputed” and “disputed” sections. Plaintiffs briefly
13 address each to the extent clarification is warranted. Plaintiffs also explain why various boilerplate
14 objections to Plaintiffs’ statement of undisputed material facts do not matter. The big picture for
15 the Court is that there aren’t any truly disputed material facts.

16 **“Undisputed Facts”:** The Bureau asserts that “[d]ecomposing human bodies can present
17 a serious risk to public health and safety.” ECF No. 42 (“Defs.’ MSJ Resp.”) at 2; *see also* ECF
18 No. 42-2 (“Defs.’ Supp. SUMF”) ¶ 40. This statement is true, but only in the trivial sense that
19 many things “can” be a “serious risk to public health and safety” in unusual circumstances.
20 Attending an elementary school play, for example, “can” be a “serious risk to public health and
21 safety” at the height of a COVID outbreak. But it doesn’t follow that school plays are dangerous
22 *generally*. We know that because school plays are perfectly legal for lay people to hold in normal
23 times and unsafe only in abnormal times when a specific public-health directive (such as a stay-
24 at-home order) is in effect.

25 So too with home funerals. Like school plays, laypeople are allowed to hold home funerals
26 in California. They do not need government permission, licenses, inspections, or the presence of

²⁸ ¹ This reply refers to the Defendants collectively as “the Bureau.”

1 public-health officials (and certainly not licensed funeral directors). This is because—under
 2 normal circumstances—decomposing human remains do not in fact present any real risk to public
 3 health and safety. Indeed, California law requires burial or cremation only in a “reasonable” time.
 4 CAL. HEALTH & SAFETY CODE § 7103(a). To be sure, Plaintiffs concede that it’s hypothetically
 5 possible that a public-health official could quarantine the remains of a specific person, which
 6 would prevent a home funeral. But that doesn’t alter the fact that the default rule in California is
 7 that home funerals are perfectly safe; the fact that the Bureau has no evidence of a home funeral
 8 ever causing any problem; or the fact that an otherwise safe and lawful home funeral cannot
 9 possibly *become* a danger to the public simply because end-of-life doulas are present to offer
 10 practical advice and assistance.

11 **“Disputed Facts”:** The Bureau disputes that it “instructed the Doula Plaintiffs to ‘hire an
 12 attorney to tell them why the Bureau issued the Citation.’”’ Defs.’ MSJ Resp. at 4. The Bureau
 13 asserts that “the statement ascribed to Bureau staff is a false and misleading interpretation of the
 14 Doula Plaintiffs’ testimony from their own declarations.” *Id.* But the declaration from Akhila
 15 Murphy that the Bureau references explains that “Bureau staff could not or would not identify any
 16 specific statutory or administrative provisions Full Circle and its end-of-life doulas had violated,”
 17 and that “Bureau staff suggested that if Full Circle, Donna, or I wanted to understand what
 18 regulations we were violating and how to comply, we should obtain legal counsel to help revise
 19 the website.” ECF No. 35-3 ¶¶ 134, 141; *see also id.* ¶ 142 (explaining that Bureau staff told Akhila
 20 “you must seek legal counsel or contact a licensed funeral director if you have any questions”).
 21 The bottom line is that the Bureau told Full Circle that the services offered on the website required
 22 licensure and refused to explain what precisely the doulas could do and not do without a license.

23 **Response to the Bureau’s SUMF Objections:** For the most part, the Bureau’s responses
 24 to Plaintiffs’ Statement of Undisputed Material Facts do not dispute the facts described by
 25 Plaintiffs. *See generally* ECF No. 42-1 (“Defs.’ SUMF Resp.”). Instead, the responses consist
 26 mainly of boilerplate and meritless objections. To address just the most common: The Bureau
 27 objects to many facts on the grounds of materiality or relevance, but those are questions of law to
 28 be decided by the Court depending on how it resolves the cross-motions. *See id.* ¶¶ 5, 8–9, 11, 13,

1 18–21, 23, 27–30, 32, 68, 72, 74–89, 91–92, 100. The Bureau objects to Plaintiff Akhila Murphy’s
 2 testimony about what end-of-life doulas do, without any substantive explanation of why she is not
 3 competent to testify about her extensive personal experiences working with end-of-life doulas. *See*
 4 *id.* ¶¶ 1–5, 8–11, 23, 25–29, 33. The Bureau also accuses Plaintiffs of “attempts to mislead the
 5 Court” where all Plaintiffs did was accurately summarize declaration evidence about what
 6 happened at the informal conference. *See id.* ¶¶ 59, 66; *supra* p. 3. Finally, in several instances
 7 where Plaintiffs relied on deposition testimony, the Bureau does not dispute the proposed fact but
 8 instead objects that the cited exhibit with the deposition excerpt does not contain relevant
 9 testimony. *See* Defs.’ SUMF Resp. ¶¶ 45, 93–96. The Bureau is mistaken and appears to be
 10 confused by Plaintiffs’ following this Court’s order, which directed the parties to internally
 11 paginate multi-page exhibits and refer to those exhibits by that internal pagination. *See* ECF No.
 12 3-1 at 4. Plaintiffs explained this pagination convention in their Statement, *see* ECF No. 35-2
 13 (“Pls.’ SUMF”) at 4 n.1, and the relevant testimony is where the citations say it is.

14 **I. The Bureau Does Not Defend the Constitutionality of Requiring Full Circle to Have a
 License to Speak, So Full Circle Is Entitled to Judgment on Count I.**

15 Parts I and II of the Bureau’s response make the same point: Plaintiffs supposedly have no
 16 First Amendment claim about restrictions on individualized advice because the November 2019
 17 Citation did not explicitly prohibit such advice. Rather, the Citation “only instructed Full Circle to
 18 stop advertising and providing services it was not licensed to provide.” Defs.’ MSJ Resp. at 5. The
 19 Bureau insists that the Citation’s command “to immediately discontinue advertising and operating
 20 as a funeral establishment” should be read as though it said “immediately discontinue advertising
 21 and operating as a funeral establishment, *except for the things you’re doing that involve protected*
 22 *speech because it is not our intention to restrict protected speech.*” Based on this, the Bureau
 23 argues that the First Amendment claim about individualized advice is a non-issue because the
 24 “Bureau has not issued any enforcement orders to Full Circle or any other Plaintiff that forbid
 25 Plaintiffs from providing individualized advice about death planning and home funerals.” *Id.* at 6.

26 The Bureau never comes out and says so, but it’s really making a standing argument. It’s
 27 saying that Plaintiffs misinterpreted the Citation, imagined a First Amendment restriction that
 28

1 doesn't exist, and sued to remedy an injury that was never inflicted. But this standing argument
 2 fails now for the same reasons that it failed last year when this Court rejected it and granted the
 3 preliminary injunction (Section A, below). Second, this sort of gamesmanship with free speech
 4 impermissibly forces speakers to make guesses about what they may and may not say. This is what
 5 Plaintiffs meant by vagueness in their opening brief, and they did not, as the Bureau contends, try
 6 to litigate an unpled claim (Section B). Finally, the Bureau does not even attempt to carry its burden
 7 under heightened First Amendment scrutiny, so Plaintiffs are entitled to summary judgment
 8 (Section C).

9 **A. The Bureau's stealth standing objection is just as wrong now as at the preliminary-
 injunction stage.**

10 As noted, the Bureau does not argue that it prevails on the merits of Plaintiffs' First
 11 Amendment claim about restrictions on individualized advice. Instead, it argues that the claim
 12 doesn't exist because no such restrictions exist, saying that the Citation didn't specifically address
 13 end-of-life advising. *See* Defs.' MSJ Resp. at 6–7. Without saying so, the Bureau is making the
 14 same standing argument it made unsuccessfully at the preliminary-injunction stage. Plaintiffs
 15 responded at length to this gambit then and again in response to the Bureau's summary-judgment
 16 memorandum now. *See* ECF No. 41 ("Pls.' MSJ Resp.") at 8–12. Plaintiffs will not belabor that
 17 latter response here, but the Bureau's stealth standing argument fails for three reasons.

18 **First**, as this Court already recognized, the Citation's blanket order to stop "operating as a
 19 funeral establishment until a license is issued" broadly reached *all* of Full Circle's activities, which
 20 mostly comprise speech. *See id.* at 8; *see also* ECF No. 23 at 5 (this Court's preliminary-injunction
 21 order "declin[ing] to construe the notice [of citation] narrowly as the Bureau urges"). In a nutshell,
 22 when government officials order ordinary citizens to stop doing *everything*, that order necessarily
 23 includes speech.

24 **Second**, the Citation is not the be-all-and-end-all of this suit. It is just one piece of evidence
 25 of the Bureau's enforcement practices that supports Plaintiffs' injunctive and declaratory relief
 26 against all future Bureau speech enforcement against Full Circle. The Bureau is simply wrong to
 27 think that parsing the wording of the Citation controls the free-speech claim here.

1 **Third**, the investigation record, the deposition testimony of Bureau enforcement officials,
 2 and the Bureau’s own representations during summary-judgment briefing all show that the Bureau
 3 believes that individualized home-funeral advice requires a license. Pls.’ MSJ Resp. 8–9. In
 4 particular, there is substantial evidence that if the Bureau investigated Full Circle again, it would
 5 find that its doulas’ guidance during home funerals, their individualized consultations to develop
 6 end-of-life plans before death, and even their public educational events about end-of-life planning
 7 would require a license. Pls.’ MSJ Resp. at 9–12; *see also* Pls.’ SUMF ¶¶ 45, 50, 52–53, 69–71,
 8 86–90, 93–98.² And the threats did not stop following the preliminary injunction, as the Bureau
 9 has even announced a new (and unconstitutional) speech restriction during summary-judgment
 10 briefing by saying it wants to ban Plaintiffs from calling themselves “home funeral guides” when
 11 they offer home-funeral guidance. Pls.’ MSJ Resp. at 16–17; *see also* Defs.’ SUMF Resp. ¶¶ 34–
 12 35 (reiterating desire to restrict use of “home funeral guide” term). Put simply, there are ample
 13 reasons Plaintiffs face a “credible threat of prosecution” for their speech, *Babbitt v. United Farm*
 14 *Workers Nat’l Union*, 442 U.S. 289, 298 (1979), and they require this Court’s protection to
 15 safeguard their First Amendment rights. *See also* Pls.’ MSJ Resp. at 18–19.³

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19 ² The Bureau complains that the specific section of Plaintiffs’ memorandum applying the strict-scrutiny
 20 framework did not discuss the evidence for Plaintiffs’ fear of enforcement. *See* Defs.’ MSJ Resp. at 7.
 21 That’s because it’s not relevant to the strict-scrutiny analysis, and is instead a standing issue. Ample
 22 evidence is detailed elsewhere in Plaintiffs’ summary-judgment memorandum and their response to the
 23 Bureau’s summary-judgment motion. *See, e.g.*, ECF No. 35-1 (“Pls.’ MSJ Mem.”) at 9–12, 18–19; Pls.’
 24 MSJ Resp. at 8–12, 18–19.

25

26 ³ Even if the Bureau were consistent in this litigation in announcing a policy that “providing individualized
 27 advice about death planning and home funerals . . . does not require licensure,” Defs.’ MSJ Resp. at 6, it
 28 would not change Plaintiffs’ entitlement to relief. Voluntary cessation moots a case only “if subsequent
 29 events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to
 30 recur.” *Rosebrock v. Mathis*, 745 F.3d 963, 971 (9th Cir. 2014) (quoting *Friends of the Earth, Inc. v.*
 31 *Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000)); *see also, e.g.*, *Bell v. City of Boise*, 709 F.3d
 32 890, 901 (9th Cir. 2013) (no mootness where “new policy regarding enforcement . . . could be easily
 33 abandoned or altered in the future”). The Bureau’s most recent strategic reinterpretation of its enforcement
 34 authority in litigation is hardly sufficient to make it “absolutely clear” that Plaintiffs’ speech is safe,
 35 especially when weighed against inconsistent statements in the Bureau’s summary-judgment briefing, its
 36 prior enforcement history against Full Circle, and its officials’ deposition testimony that speech does require
 37 a license.

1 **B. Plaintiffs are not trying to litigate an unpled vagueness claim—they are explaining**
 2 **that the Bureau’s reading of its own Citation puts speakers in the position of having**
 3 **to make guesses about what they may and may not say.**

4 In their opening brief, Plaintiffs discussed how the Bureau’s enforcement practices (as
 5 shown by the Citation and abundant other evidence) put speakers in the untenable position of
 6 having to guess about what they may and may not legally say. Pls.’ MSJ Mem. at 17–19. Plaintiffs
 7 raised this to head off exactly the strategy the Bureau has attempted before and is now attempting
 8 again: Exploiting that vagueness to assert that the Bureau, in fact, never wished to regulate Full
 9 Circle’s end-of-life and home-funeral advice in the first place. *See* Defs.’ MSJ Resp. at 5–7. The
 10 Bureau misconstrues Plaintiffs’ vagueness point as “a new claim for relief.” *Id.* at 13. It isn’t.
 11 Plaintiffs are not making a Fourteenth Amendment vagueness challenge to the facial validity of
 12 any statute or regulation.⁴ Rather, Plaintiffs want exactly the relief they asked for in Count I:
 13 injunctive and declaratory protection of their individualized advice. ECF No. 1 at 25–26 ¶¶ 232–
 14 34, 29 ¶¶ A–B.

15 Without a permanent injunction, Plaintiffs’ First Amendment rights will be in just as
 16 precarious a state as before this Court issued a preliminary injunction. The Bureau makes no
 17 argument to contradict the key points Plaintiffs raised about vagueness. The Bureau does not (and
 18 cannot) dispute that the Citation’s text provided no way to know what the Bureau thought Full
 19 Circle was doing wrong, or that such vagueness is Bureau policy for unlicensed-activity citations
 20 and so is likely what Full Circle will get again if it receives another citation. *See* Pls.’ MSJ Mem.
 21 at 18. Nor does the Bureau dispute that Field Representative Glenn Miller—the front-line
 22 enforcement official responsible for the region of California where Plaintiffs are located—thought
 23 that individualized advice *did* require a license and was never corrected by his superiors. *See id.*
 24 Nor did the Bureau try to reconcile his belief with his supervisors’ vacillating statements that some
 25 types of advice may require a license depending on circumstances. *See id.* As for the informal
 26 conference where Plaintiffs Akhila Murphy and Donna Peizer unsuccessfully tried to get some
 27 clarity, the Bureau forthrightly acknowledges that those conferences are not supposed to give

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⁴ This is why Plaintiffs did not attack a specific statute or regulation for vagueness, and why the Bureau is
 wrong to suggest they should have. *See* Defs.’ MSJ Resp. at 14.

1 guidance on “how to comply with the law.” Defs.’ MSJ Resp. at 15.

2 If this Court’s preliminary injunction is not made permanent, Plaintiffs will be left with the
 3 knowledge that they’ve faced enforcement in the past and that, in the course of two years of
 4 administrative proceedings and litigation, the Bureau’s views of what requires a license have only
 5 become murkier. Plaintiffs simply cannot know what specific speech of theirs the Bureau will say
 6 requires a license if this Court’s injunction expires. The Bureau ought not be rewarded for making
 7 it so difficult to know what speech it thinks is illegal.

8 **C. Plaintiffs are entitled to summary judgment on Count I because the Bureau does not
 even attempt to carry its burden under heightened First Amendment scrutiny.**

9 The Bureau puts all of its eggs in one basket—it hopes the Court will simply refuse to
 10 consider the First Amendment claim about advice on the merits. The Bureau makes no argument
 11 in the alternative that it can survive First Amendment scrutiny. It does not contest that the
 12 government must satisfy strict scrutiny to restrict Full Circle’s individualized advising on end-of-
 13 life planning and verbal guidance during home funerals. *Compare* Pls.’ MSJ Mem. at 12–13 &
 14 n.3, *with* Defs.’ MSJ Resp. at 6–7; *see also*, e.g., *Hines v. Quillivan*, No. 1:18-cv-155, slip op. at
 15 4–6 (S.D. Tex. Dec. 9, 2021) (decision yesterday that strict scrutiny applies to individualized
 16 advice, in veterinary context). Nor does the Bureau propose a compelling government interest to
 17 justify speech restrictions or argue that restricting the doulas’ speech is the least restrictive means
 18 to serve any compelling interest. *See* Defs.’ MSJ Resp. at 6–7. Because the Bureau has not even
 19 attempted to meet its heavy burden, Plaintiffs are entitled to summary judgment on their First
 20 Amendment claim for their individualized advice (Count I).

21 **II. The Bureau’s Conclusory Response to Plaintiffs’ Due-Process Claim Is Exactly the Kind
 22 of Reasoning That *St. Joseph Abbey* Rejected.**

23 Plaintiffs’ substantive due process claim is about practical, hands-on assistance during a
 24 home funeral. Doulas may help families perform simple tasks that are lawful for laypeople to do
 25 but which are usually unfamiliar. These activities include purchasing dry ice at a grocery store and
 26 helping place it under remains to slow decomposition; moving a deceased loved one from one
 27 room to another; and undressing, washing, and dressing remains. Relying heavily on *St. Joseph
 28 Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013), which struck down funeral licensure for monks

1 selling handmade caskets, Plaintiffs argue that there is no rational basis for requiring Full Circle
 2 and its doulas to become licensed to provide this practical advice about perfectly lawful conduct.
 3 Pls.’ MSJ Mem. at 20–23.

4 The Bureau builds its response around a single proposition: “Decomposing human remains
 5 can present a danger to public health, safety, and welfare.” Defs’ MSJ Resp. at 18. This fact, the
 6 Bureau contends, is decisive: “[T]his case . . . involv[es] the handling of human remains . . .
 7 [w]hereas the dispute in *St. Joseph Abbey* involved a statute governing the intra-state sale of
 8 caskets.” *Id.* This is supposedly crucial because “[c]onstructing wooden caskets is not analogous
 9 to washing, handling or transporting human remains.” *Id.* at 18–19. Moreover, according to the
 10 Bureau, “Louisiana does not regulate the use of a casket or other container for burial . . . [w]hereas
 11 in this case California strictly regulates the handling of human remains.” *Id.* at 19.

12 But the Bureau’s argument is unpersuasive because pointing out factual differences
 13 between *St. Joseph Abbey* and this case is not the same as explaining why those differences should
 14 matter. True, this case does involve handling human remains within the context of a home funeral.
 15 But California does not “strictly regulate” that. In fact, it doesn’t regulate it at all. As the Bureau
 16 concedes, home funerals are lawful and all of the home-funeral activities the doulas want to do are
 17 legal for laypeople to perform. *See* Defs.’ MSJ Resp. at 18; *see also* Defs.’ SUMF Resp. ¶ 11 (not
 18 disputing that home funerals are legal in California and in all 50 states); ECF No. 35-4 Ex. A at 2
 19 (Bureau brochure explaining home funerals are legal). If human remains were in fact generally
 20 dangerous, then California law would treat them as such. But it doesn’t.

21 With this understood, it becomes clear that the Bureau is making the exact same health-
 22 and-safety argument that the Fifth Circuit rejected in *St. Joseph Abbey*. There, the court recognized
 23 that caskets hold human remains. That’s the point of caskets. And, if remains are generally
 24 dangerous and caskets are supposed to contain this danger, then perhaps there is a public-health
 25 rationale for allowing only funeral directors to sell caskets. But the Fifth Circuit rejected any notion
 26 that public safety required monks to be licensed funeral directors to sell caskets because “this
 27 purported rationale for the challenged law elides the realities of Louisiana’s regulation of caskets
 28 and burials.” 712 F.3d at 226. Reality, as established by the record, was that “Louisiana does not

1 even require a casket for burial, does not impose requirements for their construction or design,
 2 does not require a casket to be sealed before burial, and does not require funeral directors to have
 3 any special expertise in caskets.” *Id.* That is the same reality as here. California does not regulate
 4 home funerals at all, and thus the Bureau cannot prevail here by invoking the purely imaginary
 5 danger of human remains being present at a home funeral.

6 Indeed, the irrationality here is even starker than in *St. Joseph Abbey*. Given that laypeople
 7 can hold home funerals themselves without any permission, licenses, or the presence of a funeral
 8 director, to find for the Bureau would require this Court to accept the notion that otherwise safe
 9 and lawful home funerals *become* dangerous when a doula is present. That is nonsensical, and
 10 whatever deference the government is owed when the issue is debatable, this Court is not required
 11 to accept the patently irrational. *St. Joseph Abbey*, 712 F.3d at 223, 226 (“a hypothetical rationale,
 12 even post hoc, cannot be fantasy”; the government isn’t entitled to “judicial blindness to the history
 13 of a challenged rule or the context of its adoption,” and courts need not accept “nonsensical
 14 explanations for regulation”).

15 **III. The Bureau Effectively Concedes that Plaintiffs Should Prevail on their Commercial-
 16 Speech Claim to the Extent the Advertised Speech or Conduct Is Protected.**

17 Consistent with its summary-judgment memorandum, the Bureau offers no justification for
 18 restricting commercial speech that advertises services Plaintiffs can lawfully provide without a
 19 license. It argues only that it can regulate advertisement of activity that requires a license. *See, e.g.*,
 20 Defs.’ MSJ Resp. at 8 (no First Amendment protection for “advertising *illegal* activity”), 10
 21 (“substantial interest in stopping *unlicensed* activity”), 12 (Bureau “address[ing] the harm of Full
 22 Circle advertising services that it is *not licensed* to provide, and the misleading implication [Full
 23 Circle is] qualified to provide services that fall within the Act’s *licensing* requirements”) (all
 24 emphases added). Thus, to the extent Plaintiffs succeed through Count I and Count III in showing
 25 that the Bureau’s licensure requirements cannot constitutionally be applied to their services, they
 26 are equally constitutionally entitled to advertise those services. *See* Pls.’ MSJ Resp. at 14–16.

27 The Bureau does not contest that under heightened constitutional scrutiny, it is the
 28 government that bears the burden to prove speech restrictions are sufficiently necessary to advance

1 a substantial government interest. *See* Defs.’ MSJ Resp. at 8 (describing *Central Hudson* test for
2 commercial speech). Because the Bureau does not offer any arguments for restricting advertising
3 for services that do not require a license, it cannot meet its burden for any such advertising. The
4 closest the Bureau comes is to say it doesn’t *need* evidence of actual consumer harm to justify a
5 commercial-speech restriction. *See id.* at 16–17. True enough, but the Bureau doesn’t dispute that
6 it lacks any such evidence, and because it has put forward no independent evidence that harm *will*
7 arise, it has no basis to regulate advertisement of services outside its licensing authority.

8 CONCLUSION

9 Summary judgment should be granted to Plaintiffs on all counts, and the Bureau’s cross-
10 motion should be denied in its entirety.

11 Dated: December 10, 2021.

12 Respectfully submitted,

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22 CERTIFICATE OF SERVICE

23 I hereby certify under penalty of perjury that a copy of the foregoing was served on all
24 counsel of record via the Court’s CM/ECF system.

26 /s/ Jeff Rowes
27 Jeff Rowes

28 Attorney for Plaintiffs